

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GAIL ROME)	
Claimant)	
VS.)	
)	Docket No. 231,906
NELLCOR PURITAN BENNETT)	
Respondent)	
AND)	
)	
CONTINENTAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Julie A.N. Sample's February 14, 2001, Award. The Appeals Board heard oral argument on August 22, 2001.

APPEARANCES

John G. O'Connor of Kansas City, Kansas, appeared on behalf of the claimant. Timothy G. Lutz of Overland Park, Kansas, appeared on behalf of the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant failed to prove she suffered any additional permanent functional impairment to her preexisting low back condition while performing her regular work activities from November 12, 1997, through March 3, 1998, while employed by the respondent. Moreover, the ALJ also found claimant failed to prove she suffered a psychological condition as either a direct result of a work-related physical injury or that she had a preexisting psychological condition which was aggravated and made worse because of a work-related physical injury. The ALJ did find that claimant proved a temporary exacerbation of a preexisting low back condition and awarded claimant future medical treatment upon application and approval of the Director and the unauthorized medical allowance.

On appeal, claimant contends her testimony and Dr. P. Brent Koprivica's medical opinions prove claimant's regular work activities permanently aggravated and worsened her severe preexisting low back condition resulting in additional permanent functional impairment. Additionally, claimant argues that her testimony coupled with both Dr. Koprivica's and Dr. Gregory L. Bono's medical opinions prove claimant not only suffered additional permanent impairment, but she also aggravated a preexisting psychological condition that permanently and totally disabled her from performing any substantial and gainful employment.

In contrast, respondent contends the ALJ was correct in finding claimant failed to prove (1) she suffered both a permanent injury and, (2) if claimant does have a psychological condition that the condition was related to a physical injury. Respondent also argues that claimant is not entitled to any workers compensation benefits because she further failed to prove (1) she suffered an accidental injury arising out of and in the course of her employment, (2) she failed to prove she gave timely notice of an accident and, (3) she failed to prove she served respondent with a timely written claim. Thus, respondent argues that under any circumstances claimant has failed to prove that she is entitled to any workers compensation benefits for an alleged series of accidents occurring from November 12, 1997 through March 3, 1998.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the records, considering the briefs, and the parties' arguments, the Board makes the following findings and conclusions:

Except for the ALJ's conclusion that claimant may be entitled to future medical benefits, the Board finds the ALJ's Award should be affirmed. The Board further finds the ALJ's Award sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order. The Board, therefore, adopts the ALJ's findings and conclusions as its own that are not inconsistent with this Order.

There is no dispute the claimant suffers from a severe low back condition. This condition dates back to the early 1960s when claimant was in her 20s. At that time, as a result of an injury, claimant underwent lumbar laminectomy surgery. On the date claimant last testified in this case, on May 9, 2000, claimant was 57 years of age. She started working for the respondent in 1988 and last worked for respondent on June 14, 1999.

On August 5, 1994, March 23, 1995, and August 27, 1997, claimant either suffered separate work-related injuries to her low back or permanently aggravated her preexisting low back condition in separate accidents while working for the respondent. As a result of those injuries, claimant filed separate workers compensation claims. In an October 23, 1997, Settlement Hearing before a Special Administrative Law Judge (SALJ), claimant settled those claims for a 25 percent permanent partial general disability based on

permanent functional impairment. At that time, claimant had returned to work for respondent in an accommodated position and, therefore, work disability, was not an issue. Primarily because of the March 23, 1995, accident, claimant was taken off work from April 17, 1995, until February 17, 1996. In the Settlement Hearing, the SALJ noted that respondent had paid claimant a total of \$14,263.63 in temporary total disability compensation at \$319.00 per week for a total of 44.17 weeks. In accepting that settlement, claimant agreed to relinquish her rights to both future medical treatment and to review and modify the Award.

The claim, which is subject of this appeal, is for a series of accidents claimant alleges she suffered after the October 23, 1997, Settlement Hearing while working for the respondent from November 12, 1997, through March 3, 1998. Claimant alleges she permanently aggravated and made worse her preexisting low back condition while performing her regular work activities for respondent during that period of time. Furthermore, claimant alleges she now suffers a psychological condition that was either caused or was permanently aggravated by her worsening low back condition resulting in permanent and total disability.

Three physicians testified in this case and all three expressed opinions on whether claimant suffered additional permanent functional impairment and whether her psychological condition was either caused or permanently aggravated by her work-related physical injuries. All three physicians had either treated or examined claimant for her low back injuries both before and after the October 23, 1997, Settlement Hearing.

The ALJ found, the opinions of orthopedic surgeon Dr. Brian H. Healy, the independent medical examiner, the most credible and persuasive in regards to whether claimant's alleged series of accidents resulted in any additional permanent functional impairment and whether the physicians who testified, including himself, were qualified to express opinions on claimant's alleged psychological problems.

The ALJ appointed Dr. Healy to perform an independent medical examination of claimant on August 20, 1997, and also on October 13, 1999. During the August 20, 1997, examination, claimant talked to Dr. Healy, and allowed him to perform a physical examination. But when Dr. Healy attempted to examine claimant on October 13, 1999, she would not allow the doctor to even touch her. Dr. Healy admitted that as a result of the October 13, 1999, examination he felt claimant generally appeared outwardly very different than the time that he examined claimant on August 20, 1997. But Dr. Healy opined that he was not qualified to make an opinion on whether claimant's current mental status was a result of her worsening subjective pain complaints. Dr. Healy was also asked, if he noted from Dr. Bono's April 21, 1998, medical record, that Dr. Bono had made a diagnosis of a reactive anxiety secondary to his primary diagnosis of chronic lumbar strain and bilateral sciatica. Dr. Healy replied that he was not sure he had noted that diagnosis, but if he had, he wasn't sure Dr. Bono was qualified to make such a diagnosis and whether the

physicians who saw claimant, including himself, were qualified to express opinions on psychological problems.

In 1997, utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, and DRE Lumbosacral Category IV contained therein, Dr. Healy assessed claimant with a 25 percent permanent functional impairment for work-related injuries to her lower back. After Dr. Healy's October 13, 1999, examination of claimant, he found no additional permanent functional impairment because he could not find any additional objective findings different than he found in 1997. Dr. Healy answered, "Yes", when asked if it was his opinion that any incidents that occurred while claimant was working between November 12, 1997, and March 3, 1998, involved a temporary aggravation of claimant's low back condition.

Dr. Bono, claimant's treating physician, also opined that claimant only suffered a temporary exacerbation of her low back condition while performing work activities for the respondent between November 12, 1997, and March 3, 1998.

The law in Kansas is specific that before an injured worker's psychological problems are compensable, those problems have to be directly traceable to a work-related physical injury.¹ An injured worker's preexisting psychological condition is also compensable, if the injured worker's work-related physical injury aggravates, accelerates or intensifies the preexisting psychological condition.² The workers compensation act places the burden on the injured worker to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and to prove the various conditions on which that right depends.³

Here, the Board agrees with the ALJ's conclusion that claimant only proved she suffered a temporary exacerbation of her preexisting low back condition and not a permanent aggravation. Claimant also failed to present any credible and persuasive evidence to prove that she had a psychological condition. Moreover, even if claimant has a psychological condition, it is not compensable because claimant failed to prove it was the result of the alleged series of accidents.⁴ The alleged psychological impairment, if any, is not directly traceable to the temporary injury.

¹ Love v. McDonald's Restaurant, 13 Kan. App. 2d 397, 400-01, 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

² Boutwell v. Domino's Pizza, 25 Kan. App. 2d 110, 121, 959 P.2d 469 (1998).

³ See K.S.A. 1997 Supp. 44-510(a) and K.S.A. 1997 Supp. 44-508(g).

⁴ See Gleason v. Samaritan Homes, 260 Kan. App. 970, 926 P.2d 1349 (1996).

As previously noted, the Board does find that the ALJ's Award should be modified because the ALJ's finding that claimant is entitled to future medical benefits upon proper application and approval by the Director. The Board concludes that, since we found the claimant only suffered a temporary exacerbation of her preexisting low back condition, future medical benefits cannot be awarded because an injury that is only temporary is resolved and no longer exists.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Julie A.N. Sample's February 14, 2001, Award should be affirmed, except that claimant is not entitled to future medical benefits.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent
Julie A.N. Sample, Administrative Law Judge
Philip S. Harness, Workers Compensation Director